In regard to such cases (see Bateman on Commercial Law, §§ 711, 712), it has been thought that if the labor required by the contract can be performed without destroying all traces of the identical thing, the transaction may be regarded in the light of a bailment; but that if the labor cannot possibly be so performed, it ought to be considered as a transfer of property by exchange, in which the thing is given, together with a compensation for the thing required.

No case, however, appears to have arisen in which the evidence proved a bailment, and, at the same time, the non-existence of every fact by which the identical thing delivered could be traced. And, perhaps, it is well enough not to decide a case of which, as yet, no evidence has been heard.

W. O. B.

RECENT AMERICAN DECISIONS.

Supreme Court of Illinois.

THE PEOPLE, *ex rel.* KEYES, *vs.* THE AUDITOR OF PUBLIC ACCOUNTS OF THE STATE OF ILLINOIS.

The writ of *mandamus* is not a writ of right, but it is discretionary with the Court whether it will be awarded. When there is a complete remedy at law, it will never be dispensed.

The issue of the writ being discretionary, the court will not entertain jurisdiction where substantial interests are not involved; it would be to encourage petty litigation. Where the sum involved, therefore, is only two dollars, the peremptory writ would be denied, even if it were admitted to be just to issue it.

A demurrer to the auditor's return to an alternative writ of mandamus, setting up facts tending to show that the writ ought not to issue, some of which are provable by the legislative journals only, and some by parol evidence, admits not only the facts resting on record evidence, but all facts necessarily existing outside of, and never appearing upon the journals, so far as they would be proper evidence for any purpose.

If the Constitution provide for the adjournment of the legislature by the governor, in case of a disagreement between the two houses as to the time of adjournment, and the governor, claiming that the contingency contemplated in the Constitu-

tion has arisen by proclamation, declares the houses adjourned, and the latter acquiesce in that act, abandon the capitol, draw their pay, and return to their homes, such acquiescence and dispersion constitute an adjournment of the legislature in fact, whether the act of the Governor was rightful or wrongful; and the members cannot resume their session, unless legally convoked again by the Governor.

When the legislative and executive branches of the government, by the adoption of an act, give a construction to a provision of the constitution, if the construction thus given is only doubtful, the courts will not hold the act void.

The power of a legislature to enforce the attendance of absent members is plenary, and may, if necessary, be enforced by *posse civitatis*.

THE facts of the case sufficiently appear in the opinion.

WALKER, J.—The record in this case shows that, on the 8th day of June 1863, the Senate adopted a joint resolution for a final adjournment at six o'clock in the afternoon of that day. It was sent to the House, where it was taken up and amended by inserting the twenty-second of June, and ten o'clock in the forenoon, as the time for adjournment; and thus amended, it was adopted by the House. On the same day, as amended, it was returned to the Senate, where it was taken up, and, on the question whether the Senate would concur with the House amendment, it was decided in the negative. During the afternoon of the same day, the House adopted a resolution, in the preamble to which they say they wish to reconsider their action in amending the resolution. By the resolution itself, they request the return of the joint resolution for reconsideration. This resolution seems to have been communicated to the Senate immediately after the vote had been taken refusing to concur in the House amendment to the joint resolution; but it does not appear that the Senate took any action upon this request, nor that either house took any further steps on the resolution to adjourn.

At four o'clock in the afternoon of the eighth, the Senate adjourned until ten o'clock the next morning. The House, on the evening of the same day, adjourned over until the tenth, in accordance with a previous resolution of that body. The Senate met on the ninth and adjourned to the tenth, when it again met, and, whilst in the transaction of business, the Speaker read a proclama-

tion from the Governor, declaring the General Assembly adjourned until the first Monday in January 1865; whereupon the speaker vacated the chair, a Speaker *pro tem.* was elected, and a joint committee was appointed, who reported a protest against the action of the Governor, which was adopted and spread upon their journals, and adjourned over until the morning of the eleventh, when there is entered a convening order, after which all entries cease upon the journals until the twenty-third of June.

The House met on the tenth, and, in the course of their proceedings, the Governor's proclamation was read to the House, after which they joined in the appointment of a joint committee to prepare the protest, which was also adopted by the House and spread upon their journals; but the House journals fail to show any adjourning order on the tenth, after which day all entries cease until the twenty-third day of that month. It also appears that, on the tenth, after the Speaker *pro tem.* was elected by the Senate, the roll was called, and only twelve Senators answered, when a call of the Senate was ordered, but was afterwards dispensed with.

It appears, from the journals of both houses, that entries were made on the twenty-third, stating that the houses had convened, and afterwards that adjournments were had until the twenty-fourth. Convening orders appear on both journals on that day, and a joint resolution to adjourn both houses until the Tuesday after the first Monday in January, 1864, after which no more minutes appear on the journals of either house. The relator alleges that he was present in the discharge of his duties as a Representative on these two last days. That he holds the certificate of the Speaker therefor, which he presented to the Auditor for a warrant on the treasury for the sum of two dollars alleged to be due, but that the Auditor refused to draw the same.

The return alleges that, after the Governor's proclamation was received on the tenth of June, the members of the two houses, during that and the succeeding day, settled their accounts with the Speakers; that they obtained from those officers their certificates of attendance, which were presented to the Auditor, who

drew warrants on the treasury for their several sums; that they obtained their pay, returned to their homes, and the doors of the halls were closed; that on the twenty-third of June, two Senators and four Representatives met in their respective halls, but denies that they were in session as a legislative body at that time, and that relator was not in attendance as a Representative, and is, therefore, not entitled to compensation as such. It admits that the Speaker's certificate was presented, and a warrant on the Treasurer was demanded and refused. To this return a demurrer was filed, which presents the question as to the sufficiency of the return of the Auditor.

The demurrer admits the truth of the facts set out in the pleadings to which it is interposed. But it is contended that it admits such facts, only, as are well pleaded, and as could be used in evidence on the trial. That such facts as could only be proved by record evidence, and which, from the pleadings, appear to exist only in parol, would not be admitted. If this is the true rule, which I deem unimportant to determine, still, all facts necessarily existing outside of, and never appearing upon the journals, so far as they would be proper evidence, would be admitted by the demurrer. The settlement of the accounts, the drawing of their pay by the members, their return to their homes, and the closing of the halls, never appear upon the journals; and, if such facts might be proved for any purpose, they would, under the rule contended for, be admitted by the demurrer. The inferences or conclusions of law stated in the return would, of course, not be admitted.

The Governor's proclamation was issued under the thirteenth section of the fourth article of our constitution. It is this: "In case of disagreement between the two houses with respect to the time of adjournment, the Governor shall have power to adjourn the General Assembly to such time as he thinks proper, provided it be not to a period beyond the next constitutional meeting of the same." The force of the argument, on both sides of this case, seemed to be to the point whether the contingency contemplated by this provision had arisen, so as to authorize the Governor to

interpose his power to adjourn the General Assembly. From the research and reflection that I have been able to give the case, I have arrived at the conclusion that there are other questions involved, material to its decision. And I shall, having stated the facts, and what I deem proper under the demurrer to be considered, proceed to give my views as concisely as the nature of the case will permit. I regret that an adjudged case cannot be found involving the same or a similar state of facts, which could shed light upon the question.

It is upon this state of facts the court is called upon to determine whether the General Assembly was adjourned on the tenth or twelfth day of June last. If, by the Governor's proclamation, by the action of the two houses on those days, or if by the joint action of the Governor and of the two houses, the session was either adjourned or terminated, then there could have been no session on the twenty-third and twenty-fourth of June, and the relator would not be entitled to compensation.

It is not denied that the Governor issued his proclamation under the thirteenth section of the fourth article of our constitution. In doing so he claimed that the contingency therein provided for had arisen, and that he was authorized to act. And whether this be so or not, when we see, from the absence of all entries upon the journals, that the two houses ceased to hold further sessions, the members drew their pay, returned to their homes, and the halls were closed, this apparent acquiescence on the part of the members of the two bodies, to my mind is satisfactory evidence that they designed to terminate the session. By this course of action, it would unquestionably seem that they had determined to cease to meet, and, whatever weight they may have attached to the Governor's proclamation, they did, in fact, adjourn, or at least ceased to hold their daily sessions, according to the usual course of such bodies; and this cessation was, so far as the journals show, without day. And it seems that it was designed to adopt the act of the Governor. Suppose the Governor, without any pretence of a disagreement, had come into the house and declared them adjourned *sine die*, and the Speaker had so announced, and it had

been entered on the journals of each house that on that day the General Assembly had so adjourned, and the members had dispersed and business had ceased, would any person contend that the session was not terminated, notwithstanding a want of a joint resolution?

Or suppose the Speaker, independent of all action by the Governor, were to declare that the General Assembly was adjourned *sine die*, and it should be so entered on the journals, and the members should disperse, and further meetings should cease, what would be the inevitable conclusion? While it is laid down by all writers on parliamentary law that when such a body is once organized, the session can be terminated only by the expiration of the time for which the members were elected, by executive action, or by resolution, they do not, so far as I can find, say that such a resolution must appear on the journals. It is true that it is usually by such a resolution that the sense of the two houses is obtained, but, if that sense were manifested in any other clear and satisfactory mode, no reason is perceived why it should not be as obligatory as if it were reduced to writing and spread upon the journals. It is the agreement of the two bodies that would form the resolution, whilst the written resolve is only evidence of the joint concurrence of the two bodies. If acts of the two houses appear, which render it clear that it was their resolution to adjourn, I have no hesitation in saying that such would be the effect, although a joint resolution did not appear upon the journals. If simultaneously each house were to adopt a resolution, or simply vote, that they would adjourn at the same time, and when the period had arrived, they were to act upon it, I am unable to perceive that the session would not be terminated.

It is true that the joint rules of the two houses provide for an adjournment *sine die* by joint resolution. But this is not a constitutional requirement, and, like all such rules, it was adopted to facilitate the transaction of business, and doubtless should be observed by the two houses; but will it be said that, because this or any other rule is violated, an act not in contravention of the constitution is void alone for that reason? Suppose a law should be

adopted with all the constitutional and legislative requirements, but in violation of a joint rule, or a rule of one of the houses, can it be said that the law would be void? Our constitution has prescribed no mode by which the sessions of the General Assembly shall terminate. That is left to the two houses to determine; the only check it has imposed being a prohibition upon either house from adjourning for more than two days without the consent of the other. I am, therefore, of the opinion that a joint resolution, formally adopted and spread upon the journals, is not indispensable to the termination of the session by an adjournment without day.

Suppose the two houses were, in fact, to adopt such a resolution, and disperse on the day fixed, and suppose the Clerks of the two houses, by accident or design, were to fail to enter it upon the journals, would the General Assembly be adjourned? Or have the clerks the power to thwart the purpose of the houses by continuing the session against the unanimous consent, it may be, of the members? If such is the effect of their neglect, it would also give them the power to prevent laws regularly adopted, and intended to take effect sixty days after the day agreed upon for an adjournment *sine die*, from going into operation; also, to prevent the Executive from returning bills to the house in which they originated, with his objections, within the period limited by the constitution; and thus deprive the Governor of his right to the employment of his limited veto powers in the mode prescribed by the constitution. If an adjournment without day cannot be effected except by a resolution for that purpose appearing upon the journals; if nothing can be inferred from the absence of all entries for a long space of time; or if parol evidence cannot be received to prove the occurrence of acts and circumstances outside of the journals, and which are never found upon them, from which inferences may be indulged, then the negligence of the clerks might produce all of these consequences.

As a matter of history in legislation, it seems to be true that, when the hour arrives for adjournment, the members are usually not in the halls, and do not remain to see that the journals are

made up, leaving that to be done by the Clerks. It may be said that such an omission could be corrected by the houses when they again convene; but, if the members never return, it would not be corrected, nor could it generally be done in time to enable the Governor to return bills placed in his hands within ten days before the adjournment. Nor is it probable that it could be proved by verbal evidence that the resolution had been adopted, any more than that a bill had passed which did not appear from the journals, or that a court had rendered a judgment which the Clerk had failed to record.

Again, it is a rule familiar to the profession, that when the legislative and executive branches of the government, by the adoption of an act, give a construction to a provision of the constitution, if the construction thus given is only doubtful, the courts will not hold the act void. It is only in cases of its clear infringement that courts will interpose to hold the act nugatory. And it is for the reason that each co-ordinate branch of the government is under an equally solemn duty to support and maintain that instrument, and, when they have performed the act, it must be presumed that they have not acted with a reckless disregard of so high a duty. Then, applying this rule, when the Governor asserted his right to adjourn the session, if the two houses acquiesced in it, the court would not say that it did not produce an adjournment, unless it was clear that such was not the effect. It is true that the session might terminate and yet the Governor have no constitutional power under the circumstances to adjourn the body. But the course of the two houses acting upon the Governor's suggestions, in dispersing and not coming again together, would show that both of these branches of the government understood the session to have terminated.

But suppose the case is considered on the subsequent acts of the two houses and the members. It was the manifest design of the framers of the fundamental law of the State to confer ample power upon the two houses of the General Assembly to continue their sessions to the full extent of the necessity of its continuance. To effectuate this object, they adopted the twelfth section of the third

article of the constitution, which is this: "Two-thirds of each house shall constitute a quorum; but a smaller number may adjourn from day to day, and compel the attendance of absent members." The framers of that instrument, no doubt, supposed that they had conferred ample power, by this clause, to prevent the termination of their sessions by the reason of a want of a quorum, because they grant power to compel the attendance of absent members. If the members of the two houses who remained after the proclamation was announced believed it was unwarranted, why was not this power invoked for the purpose of restoring a quorum?

It was suggested, on the argument, that such an effort would have proved unavailing; but the court cannot assume this fact to be true. Each house being clothed with that power, and failing in its exercise, it would seem to indicate that they did not, on their final action, suppose their privileges were invaded. It would seem to be natural that, if they believed the act of the Governor to be unconstitutional, they, to preserve the dignity of the house,—to prevent the encroachment of executive power upon their rights,—would have done some act to preserve the session, if not by the enforcement of the attendance of members, at least by adjourning from day to day, as authorized by the constitution.

Why was the power given to a less number than a quorum to adjourn from day to day, if not to enable a minority to continue the life of the session? According to legislative usage, any number less than a quorum have no power to perform any legislative function. The framers of that instrument must have supposed that, unless such power was conferred, an adjournment from day to day could not be had by less than a quorum, and that, in such case, the session must end. Otherwise, why insert the provision? It must be supposed that those who adopted that instrument employed no language beyond what was necessary to express their ideas in the clearest and most unambiguous manner. Nor can it be supposed that they would delegate by express provision power already possessed. Every delegation of power to the officers of government, or the Legislature, was made to accomplish a purpose. And in this I am at a loss to perceive any other than to enable the body to prevent a termination of their sessions.

Again, by article 3, section 13, of the constitution, it is declared that "Each house shall keep a journal of their proceedings, and publish the same." This requirement being peremptory, it must be presumed that the two houses will, when in session, observe and perform the duty. We have no right to suppose, or by any means conclude, that they will disregard the injunction. Then can it be inferred, when we find the journals blank for at least ten legislative days, that the two houses were in session, and, in violation of their obligation to the constitution, were keeping no journals of their proceedings? Is it not more reasonable to presume that the houses were not in session? It may be said that they did no business, but we would expect to find convening and adjourning orders, at the very least, if they were in session. The almost uniform custom of such bodies is to note every day that portion of their proceedings, if no other transaction. Then, if they were not in session, were they not adjourned? And, if so, the minutes of the two journals having closed without any adjournment to any day, was it not an adjournment without day?

Whilst an adjournment from day to day is designed to, and does, keep the session in life, an adjournment *sine die* is always understood to terminate the session. And, to prevent either house from delaying or preventing the transaction of business and terminating the session before the two houses are ready to end it, the nineteenth section of the same article declares that "Neither house shall, without the consent of the other, adjourn for more than two days, nor to any other place than that in which the two houses shall be sitting." Under this provision, it will be seen that each house was powerless, without the consent of the other, to adjourn beyond two days. And the journals offered no evidence that consent was given by either for a temporary adjournment. Yet we do find, from the fact that there is a blank in the journals, indications of an entire suspension of business, from which we must conclude that the two houses were not in session; and, if not in session, the presumption must be that they were adjourned either to a particular day, or without day. And, as we find no order of adjournment on the journals to a day, it would

seem to follow that it was *sine die*. Each house had the right, without the consent of the other, to adjourn from day to day; and, if they had so adjourned, it would be expected to appear from the journals.

It is but a reasonable presumption, when we find the two houses adjourned, or at least out of session, for more than two days, that it is by consent, rather than in violation of the constitution. And, when the journals show no adjournment to a specified time, it must be presumed to be *sine die*. It is, however, said that, when the body rises without coming to a resolution to adjourn to a specified day, it must be presumed that it was intended to be till the next legislative day. When the rising is followed by the body coming together on that day, the inference would be natural and proper. But, when they fail to meet on that day, the presumption is rebutted. And, in this case, the journals fail to show that they did meet on the next or succeeding day.

If the presumption is indulged that this was not designed to be a final adjournment by consent of the two houses, then the session continued, and the body might come together at any time they chose before the organization of the next house, and resume business. If this were so, who could know when laws took effect? Could it be possible that the members and officers of the two houses could draw pay during all that time? The fact that the people and the officers of the law must know when laws take effect, renders it absolutely necessary that there should be a time, that might be certainly known, when laws become operative; and that can only be from the journals. If we find that the session terminated in pursuance of a resolution, that is satisfactory and conclusive; or, if we find that all business has ceased for a period of more than two days, without an adjourning order, and no entries are found, then the inference should be drawn that it was an adjournment *sine die*, and equally terminated the session.

In this case, the last entry is found on the Senate journal of the eleventh day of June, and it must be presumed that the session terminated on that day. If so, it cannot matter whether there were many or few members of the two houses who came together

on the twenty-third, as they had no power to revive the session already terminated, which could only be brought together by Executive proclamation.

The writ of *mandamus* is not a writ of right, but it is discretionary with the court whether it will be awarded. When there is a complete remedy at law, it will never be dispensed. To this effect is the uniform current of authority.

Being discretionary, and the sum in this case being only two dollars, even if it were admitted to be just, I do not feel that justice would be promoted by entertaining jurisdiction, as substantial interests are not involved. It would be to encourage petty litigation, to the expense of the State, and the delay of other important interests.

For this, if for no other reason, I should be inclined to refuse the writ; but I regard either of the various grounds discussed as amply justifying the court in arriving at that conclusion. When the alternative writ was granted, all questions as to its sufficiency were reserved, and I am now satisfied that it was improvidently issued, and that there are no grounds shown for relief.

The peremptory writ is therefore refused.

NOTE I.

I. The above case is interesting to all classes, from the political occurrences in which it originated, and important to the profession by reason of the legal principles discussed and applied. By special arrangements we are enabled to lay it before the readers of the REGISTER some months in advance of its publication in the reports. It is part of the current history of the country, that, in the session of the General Assembly of Illinois, to which the foregoing opinion relates, sundry political discussions assumed a very angry and even threatening aspect. So much so, that it was at one time announced in the public press that civil war in that state was imminent, if, indeed, it had not already commenced. Differing, as the Governor did, in sentiment with a majority of the legislature, his order of adjournment was viewed by many as totally unauthorized, and as being simply a skilful political *coup d'etat*. It is understood that the general political views of the judges are not, in all respects at least, in exact coincidence with those of the executive. It does the court great credit that in the foregoing opinion its members have had the good sense and the good taste exclusively to confine themselves to the case in its *legal* aspects and relations.

The elementary principles applicable to the writ of *mandamus*, are clearly and correctly stated. The chief interest of the case, in this respect, consists in the application of these principles to an unusual state of facts. The point as to the non-conclusive effect of the certificate of

the Speaker upon the auditor is, so far as we recollect, new, and, in our judgment, was rightly ruled.

II. But the interest and importance of the case centre mainly upon the Governor's order of adjournment, and the subsequent action of the legislative body. We have heard the criticism made that the court did not, in the principal case, fairly and fully meet and determine the issues which it involved. We cannot acquiesce in the justice of this stricture. It is true that the case might possibly have been decided on other grounds, one of which we will presently suggest. It is also true that it presented other points, which might legitimately have been decided, but which, under the view taken by the court, it was unnecessary to decide. The record advised the court that the General Assembly did, in fact, close their session in consequence of the executive order; that the members acquiesced in this order, ceased their labors, drew their pay, and dispersed. And the court very properly conclude that the session was ended—adjourned—and this whether the order was or was not authorized, and hence it was not essential to pass upon its validity.

But the opinion is silent upon a most material view of this order, and one which it seems to us must have occurred both to the counsel and the court; and that is the question, whether the decision of the Governor, that there was "a disagreement between the two houses with respect to the time of adjournment" (Art. 4 sec. 13 of Const.) can be reviewed by the judicial department of the government? It cannot be said that the executive acted wholly without pretence of right, for that there was *some* "disagreement with respect to the time of adjournment" is evident. That this disagreement had become fixed and irreconcileable does not so clearly appear. Under these circumstances we have grave doubts whether the judgment of the executive, that such a disagreement existed as authorized him to adjourn the body, can, of right, or ought, from courtesy to a co-ordinate branch of the government, to be reviewed and set aside by the courts. There are cases, not in point we admit, but which by analogy, and by the principles upon which they rest, strongly favor the idea of the conclusiveness of the executive decision upon all persons. Thus, where an Act of Congress authorized the President to call forth the militia of the states "whenever the United States should be invaded, or be in imminent danger of invasion," it was held by the Supreme Court of the United states that the President was the exclusive and final judge whether the exigency contemplated had arisen: Martin *vs.* Mott, 12 Wheat. 19. Mr. Justice STORY, who delivered the opinion, thus expounds the principle on which it rests:—"Whenever a statute gives a discretionary power to any person to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts. It is no answer that such power may be abused, for there is no power which is not susceptible of abuse. The remedy for official misconduct is to be found in the constitution itself:" 12 Wheat. pp. 31, 32; see also Attorney-General *vs.* Brown, 1 Wis. 513. Again:—Where a legislature reserves power to repeal a charter for a violation of its provisions, it is held that they may determine whether the contingency has happened, and that such determination cannot be judicially reviewed. Creaser *vs.* Babcock, 23 Pick. 334; Miner's Bank *vs.* U. States, 1 G. Greene (Iowa) 553. In the case first cited, MORTON, J.

remarks:—"If a default has been committed, then, by the express terms of the compact, they (the legislature) have the right to exercise the power. They have exercised it, and therefore, by the courtesy and confidence which is due from one department of the government to another, we are bound to presume that the contingency upon which the right to exercise it depended has happened."

On the other hand, and in a large class of cases, the judicial tribunals are constantly in the habit of examining into the legality of the acts of the other branches of the government. In 1840 Chancellor WALWORTH, in Warner *vs.* Beers, 23 Wend. 125, threw out the doubt, but did not decide the point, whether "a court is authorized in any way to institute an inquiry into the mode in which a law, signed by the Governor, and duly certified by the Secretary of State, was passed," though the contrary opinion had been before intimated in Thomas *vs.* Dakin, 22 Wend. 9, 112. See also Eld *vs.* Gorham, 20 Conn. 8. But during the next year it was for the first time decided in New York—the question being admitted by BRONSON, J., to be one of great difficulty—that while the requisite constitutional solemnities in the passage of an act, published in the statute book, would be presumed, yet the contrary may be shown by proper proof, as by the journals; The People *vs.* Purdy, 2 Hill 31; S. C. and S. P. 4 Id. 384; De Bon *vs.* The People, 1 Denio 9; and there are many subsequent cases in the same state to the same effect. A similar decision had before been made by the Supreme Court of another state; The State *vs.* McBride, 4 Mo. 303; and many similar decisions have since been made in other states; Spangler *vs.* Jacoby, 14 Ill. 297; Turley *vs.* County of Logan, 17 Id. 151; McCulloch *vs.* The State, 11 Ind. 424; The State *vs.* Moffat, 5 Ohio 358; Green *vs.* Graves, 1 Doug. (Mich.) 351; Ferguson *vs.* Miners' &c. Bank, 3 Sneed (Tenn.) 609. As to majority and two-thirds' votes on passage of laws, see Southwark *vs.* Palmyra R. R. Co., 2 Mich. (Gibbs) 287; 4 Mo. 302; 32 Miss. (3 George) 650. The foregoing cases establish the principle that the courts will go behind the published statutes and inquire into their legislative history, and will pronounce any act void which has not been passed with the proper constitutional solemnities, as, for example, by the requisite number of votes. So an act is void which was shown to have been approved by the Governor, after the legislature had terminated. Fowler *vs.* Pierce, 2 Cal. 165. The kind of evidence which is admissible in making such an inquiry, will now be briefly alluded to.

III. It will be seen by the principal case that the court incline to the opinion that the journals which the law requires each house to keep, are the only proper evidence of legislative proceedings, or at least that parol evidence is not receivable. This view is well sustained. We refer to some of the cases bearing upon this subject. While neither the proclamation or message of the Governor, or reports of committees, nor even the journals, are evidence of the *meaning* of a law (Bank of Penna. *vs.* The Commonwealth, 7 Harris 156), yet the *journals* are the highest evidence of the time, manner, and circumstances of the passage of bills, and may be used to identify bills; to fix the time of passage; to show that a bill was signed by mistake; or that it was never enacted, or that it did not receive the requisite constitutional majority: The Southwark Bank *vs.* The Commonwealth, 26 Penna. St. 446; Warner *vs.* Beers, 23 Wend.

137, 171; Purdy *vs.* The People, 2 Hill 31, 4 Id. 384; and cases cited *infra.*

In Spangler *vs.* Jacoby, 14 Ill. 297, the court went so far as to hold that, where, on the final passage of a bill, the constitution requires the ayes and noes to be entered on the journals, if the journal *fails* to *show* that these requirements were complied with, the act falls, and the journal is conclusive evidence. Other courts have presumed in favor of the legislative proceedings, when the journals, as to certain requisite steps in the passage of bills, were silent; and this seems to us to be correct: McCulloch *vs.* The State, 11 Ind. 424; Miller *vs.* The State, 3 Ohio (N. S.) 475. But the same cases hold the journals to be conclusive of all facts which they affirmatively show, that evidence to show fraud or mistake in them cannot be received, and that they can only be corrected at the same or some subsequent session of the legislature: Turley *vs.* County of Logan, 17 Ill. 151; The State *vs.* Moffit, 5 Ohio, 358.

But in one case before cited (Fowler *vs.* Pierce, 2 Cal. 165), the court sanctioned the reception of parol evidence to show that an act which was passed on the last day of the session was, in fact, approved not on that day but on the next day, and was therefore void. Further, as to the journals as evidence: Watkins *vs.* Holman, 16 Pet. 25, 56 and cases; Starkie's Ev. 199; 26 Pa. St. 451 *supra;* Miles *vs.* Stevens, 3 Pa. St. (Barr) 21; Wamer *vs.* Beers, 23 Wend. 125.

As to the admissibility of parol evidence of the doings of town and city councils, which are local or miniature legislatures, see Ross *vs.* City of Madison, 1 Carter (Ind.) 281; Poweshick County *vs.* Ross, 9 Iowa 511; Meeker *vs.* Van Rensselaer, 15 Wend. 397.

J. F. D.

NOTE II.

More than half our constitutions contain a provision for an adjournment of the legislature by the Governor, in cases of "disagreement" between the two houses, in terms similar to those recited in the principal case. It is believed that, until the present, no case has arisen in which the executive has had occasion to exercise this prerogative.

That the court has not decided the precise point, therefore, as to the degree of difference between the two houses, which shall constitute a disagreement within the meaning of the constitution, has occasioned some disappointment in the profession, though, under the circumstances, the wisdom and propriety of allowing the case to go off on minor points, is not doubted. The public peace is of more consequence than the settling of an interesting precedent.

For the benefit of the profession, however, we propose to state the principal arguments bearing on the question of disagreement, as fully as the limits of a note will permit.

Was the Governor of Illinois warranted in issuing his proclamation of adjournment, under the facts recited in the opinion?

I. In the affirmative it may be argued,

1. That the reason assigned by writers on constitutional law for giving the prerogative in question to the executive, is, "that there might be a peaceable termination of what would otherwise be an endless and dangerous controversy:" Story on Const., § 1563. Ought the rule to be established, that a controversy must run its course until it has become dangerous, if not well nigh endless; or in other words, until both parties have exhausted all methods of

coercion known to legislative bodies, before the peace-compelling intervention of the Governor can be tolerated?

2. The houses constituting the General Assembly are theoretically independent: Cush. Law and Pr. Leg. Ass., p. 875. Although no joint resolution can take effect, as such, and no bill can become a law without having passed both houses, still there is no constitutional mode in which either can coerce the other into passing them.

The employment of devices to produce unanimity is discretionary, and even if there be joint rules which seem to render the use of such devices necessary to the regular progress of legislative business, those rules can be disregarded by either house at its pleasure, without impairing the validity of its acts: Cush. Law and Pr. Leg. Ass., § 857, 858, 2292.

3. The word "disagreement" is used in the constitution in a non-technical sense. It means merely a difference of opinion between the two houses, expressed by a vote or resolution as to the time of their adjournment, without reference to the probable obstinacy of either in adhering to that opinion. When the Senate, therefore, by joint resolution, fixed upon the 8th of June to adjourn, and the House, by an amendment, fixed upon the 22d of June, in which amendment the Senate refused to concur, it is idle to contend that there was no disagreement between them. A resort to the device of committees of conference could end only in either confirming or resolving a disagreement already complete.

4. But supposing that the disagreement must be irreconcilable, the fact that it is so may be inferred from other circumstances, as well as from the unsuccessful conferences of committees. The temper of the houses may be known to be unaccommodating, or they may severally so far represent the views of opposing parties, whose interests may be thought to be involved in the question, that it would be clear they could never agree.

5. By the rules of parliamentary law, the Senate could not ask for a committee of conference until a disagreement had actually taken place. The object of a conference is to reconcile a disagreement, and not to ascertain whether there is to be one: Jefferson's Manual, p. 121; Cush. 328, note.

6. As a matter of legislative history, committees of conference on a question of adjournment are unheard of. They were, therefore, not contemplated by the framers of the constitution.

7. No communication from the two houses to the Governor was necessary to apprise him of the fact of disagreement between them. The journals of the two houses, published from day to day, and made evidence by the laws of the state, were open to his inspection, as to that of all citizens. It was sufficient, if he knew the fact: Cush. 291, § 736.

8. No sufficient argument *ab inconvenienti* can be framed against the exercise of the power of adjournment, as in this case, in the United States, where the sessions of the legislature recur so frequently. The constitution brings together again, in a few months, the legislators dispersed by the Governor, fresh from the people, cooler, and perhaps better instructed.

9. The power of adjourning the General Assembly, given by our constitutions to the Governor, is not a legislative power, and its exercise by him, even if not specially provided for in the fundamental laws, would not contravene the constitutional provision which prohibits any person constituting one of the three departments into which the government is divided, from exercising any power

properly belonging to the others, though doubtless it would be a high-handed, perhaps an unconstitutional, act. A power to adjourn a legislature is, in this country, a power merely to *suspend the exercise by it of legislative functions for a limited time.*

10. A mere non-agreement, if not always equivalent to a disagreement, may, under special circumstances, become so. Suppose, in a treaty of purchase, the seller should ask one price and the buyer offer another; at this stage there would be a non-agreement merely; but if either party thereupon should drop the treaty and permanently take his leave, the non-agreement would become a disagreement. So, here, the court is asked to determine whether, on the 10th of June 1863, when the Governor's proclamation was read, there was a disagreement between the houses. In the light of existing and subsequent facts, the discordant votes, the absence of a quorum, the final dispersion of all the members, &c., &c., the court must affirm that there was. Had the houses not themselves so viewed it, they would have remained at their posts, and have disregarded the proclamation.

II. On the other hand, it may be urged,

1. That the clause in question was inserted in our constitutions to obviate the embarrassments which might arise in case one house should attempt to retain the other in session against its will, or the two houses should, in good faith, arrive at an irreconcilable difference of judgment as to the time of adjournment, or, under the control of factious or ambitious men, should attempt to make the sessions of the assembly perpetual: Madison, in 3 Ell. Deb. 367, 409; Story on Const., § 843, 1563.

2. The word "disagreement" is applied in this connection to the proceedings of a legislative body, and can mean nothing else than a *parliamentary* disagreement.

a. By persons outside of it, a legislative body can be said to have acted on a resolution or bill only when its action has been consummated; that is, when, by some conclusive vote, it has either passed it or refused to pass it; and a resolution of adjournment is not different, in this respect, from any other: a disagreement in relation to it can be said to exist only when final antagonistic action is reached, or all efforts towards agreement are abandoned. At this point, executive intervention is not in hostility to the General Assembly, but is the access of an impartial umpire.

b. The regular parliamentary progression to a disagreement consists of five steps: first, the originating house *non-concurs;* second, the amending house *insists;* third, the originating house *insists;* fourth, the amending house *adheres;* fifth, the originating house *adheres.* Conferences, of which, in this country, at least two, and in England twice that number, are had during the progression, are parts or accompaniments of these five steps. The *insisting* term may be omitted, but there can be no final action without *adherence:* 4 Hatsell 1–49, 330; Jeff. Man., § 339; Cush. L. & Pr. Leg. Ass. 2231–2275.

c. In the principal case, but one of the steps, non-concurrence, had been taken.

3. It is a mistake to suppose that a conference could not precede a disagreement. The rule, as laid down by parliamentary authorities, is the reverse of that: 3 Hatsell 226, 269, 341; 10 Grey 137; *cited and confirmed in Jefferson's Manual.*

4. No "disagreement" of any kind existed on the 10th of June, the day the

Governor caused his proclamation of adjournment to be read. There could be no disagreement existing on the 10th, as to whether there should be any adjournment on the 8th, two days before.

5. To the objection, that disagreement is a *matter* of *intention*, and if either house intends to bring about that state of affairs, it can do so, without regard to parliamentary laws or legislative rules, it is sufficient to say, that such an intention must affirmatively appear, which is so far from being the case here, that the contrary is solemnly asserted on the record by a majority of each house.

6. The Governor was not officially informed of the disagreement, if any existed, and it is a breach of privilege for the executive to take notice of any proceeding in either branch of the legislature until his attention is called to it by that body itself: Jeff. Man. § II.; 2 Hatsell 332, et seq, and 425; Cush L. and Pr. Leg. Ass. § 737; Com. Dig. *Parliament*, G. 7. This seems to have been the view of the framers of the Rhode Island constitution, which provides for an adjournment by the Governor in case of a disagreement, "*certified to him by either*" *house.*

7. An adjournment is an exercise of legislative power; 2 Hatsell 294 et seq.; 1 Black. Com. 186; Jeff. Manual § 44. As such, it can be exercised by the Governor only in cases expressly provided for; Const. Ill., Art. I. § 2; and the clause giving him the power must be strictly construed.

8. If committees of conference on questions of adjournment are unheard of, it may be for the reason simply that it is not usual for the houses to disagree on those questions, so far as to make the use of them necessary. It is only in times of extreme excitement, not often witnessed in this country, that such a difference is to be looked for.

9. Under the colonial governments, the undue exercise of the power of adjourning the legislative assemblies by the royal governors, constituted a great public grievance, and was one of the numerous cases of misrule upon which the Declaration of Independence relied; 1 Story on Const. § 844. The people of the United States, entertaining thus a strong jealousy on the subject, attempted in their constitutions to interpose a barrier against the use, or the abuse, of such a prerogative by the executive. Some of the states, as Delaware and Virginia, in their first constitutions, expressly prohibited its exercise, while the others restricted it in substantially the same terms as in the Illinois constitution. Of the constitutions now in force, fifteen contain no clause permitting the use of such a prerogative by the Governor in any case; and in those states, under the general principles of law, the houses alone have the power of adjournment. The remaining constitutions contain a provision similar to that of Illinois. The ruling idea, therefore, in the United States is *the entire prohibition or the restriction to cases of necessity, such as a dead-lock of the houses*, of the exercise of a power necessarily distasteful to a free people.

J. A. J.